87-133 (1)

Supreme Court, U.S.
FILED
JUL 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MERCILYN BUCHANAN, ET AL
Petitioner

VERSUS

STANSHIPS, INC., ET AL
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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35pp

QUESTIONS PRESENTED FOR REVIEW

Petitioner applies for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit for review of the following procedural questions:

I. Is the clerk's failure to include a provision in the judgment for costs in favor of the prevailing party a clerical error to be remedied under the provisions of Fed.R.Civ.P. 60(a)?

II. Is a prevailing parties' post judgment motion to tax allowable costs pursuant Fed.R.Civ.P. 54(d) a Fed.R.Civ.P. 60(a) motion?

III. Should a prevailing party's post judgment Motion to Tax Allowable Costs pursuant Fed.R.Civ.P. 54(d) be considered as a Fed.R.Civ.P. 59(e) motion for purposes of appeal?

IV. Does a prevailing parties' post judgment motion to tax cost pursuant Fed.R.Civ.P. 54(d) trigger Fed.R.App.P. 4(a)(4) and nullify a timely appeal?

V. Did the Fifth Circuit err in holding the prevailing parties' post judgment motion to tax cost nullified plaintiff's timely appeal?

LIST OF PARTIES

The interested parties to the Fifth Circuit proceedings were:

1. Stanships, Inc.
2. Trident Steamship Co., Ltd.
3. Mercilyn Buchanan
4. Andreas Mark Anthony Shaw
5. Standard Shipping, Inc.
6. Gelpi, Sullivan, Carroll and Laborde

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MERCILYN BUCHANAN, ET AL

PETITIONER

VERSUS

STANSHIPS, INC., ET AL

RESPONDENTS

PETTTION FOR WRIT OF CERTIORARI

DECISIONS BELOW

This pertinent procedural history follows:

1. Buchanan v. Stanships, Inc., 744 F.2d 1070 (5th Cir. 1984) reversing Summary Judgment on behalf of defendants

2. Bench trial in Middle District of Louisiana before Honorable Frank J. Polozola on February 24, 1986

3. Judgment entered in favor of defendants, dismissing plaintiff's suit with prejudice, January 26, 1987

4. Notice of Appeal filed in the Court of Appeals for the Fifth Circuit by plaintiff, January 27, 1987

5. Defendants filed a Motion to Tax Allowable Costs, pursuant Fed.R.Civ.P. 54, January 29, 1987

6. Appeal dismissed citing Fed.R.App.P. 4(a)(4) on March 16, 1987, Buchanan v. Stanships, Inc., F.2d __, slip opinion, (5th Cir. 1987).

7. Motion for rehearing and/or reconsideration filed on April 16, 1987.

8. Rehearing refused, May 11, 1987

JURISDICTION

Jurisdiction of the trial court was based upon diversity of citizenship and upon the admiralty and maritime jurisdiction of the court, 28 U.S.C. . 1333.

This court has jurisdiction pursuant 28 U.S.C. . 1254.

STATUTES INVOLVED

This petition raised issues concerning the following provisions of the Federal Rules of Civil Procedure and Federal Rules of Appellant Procedure:

Fed.R.Civ.P.52
(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59...."

Fed.R.Civ.P.54
(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Fed.R.Civ.P.59
(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

Fed.R.Civ.P.60. Relief from Judgment or Order
(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

Fed.R.App.4

Appeal as of Right - When Taken
(a) Appeals in Civil Cases
(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment

would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

STATEMENT OF THE CASE

This is a wrongful death action by a mother and minor son. After bench trial the court entered judgment for the defendants with no provision in the judgment for cost in favor of the prevailing party pursuant Fed.R.Civ.P. 54(d). Plaintiff timely filed a notice of appeal. The defendants filed a motion asserted to be pursuant Rule 52 and Rule 59 to tax allowable costs making no request to amend or make additional findings. The court without a hearing, signed an order amending the judgment to allow defendants "legally taxable costs". Plaintiff did not file a new notice of appeal and defendants filed a motion to dismiss pursuant Fed.R.App.P. 4(a)(4).

The Fifth Circuit court dismissed plaintiff's appeal citing Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., 784 F.2d 665 (5th Cir. 1986), where it held that for purposes of appeal any timely filed post trial motion falls within the scope of Rule 59 (e) and triggers Fed.R.App.P. 4(a)(4) regardless of how it is styled, except motions seeking to correct purely clerical errors covered by Rule 60(a) even though such motions might be timely if filed at a later date. (Harcon Barge Co., Inc., p. 667).

The Fifth Circuit erred in holding a post judgment motion for costs by a prevailing party was for purposes of appeal a Fed.R.Civ.P. 59(e) motion to trigger Fed.R.App.P. 4(a)(4). Defendant's motion to tax allowable cost should have been classified as a motion to correct a clerical error covered by Fed.R.Civ.P. 60(a). The decision is in direct conflict with decisions in the 11th and 9th circuits.

ARGUMENT

In dismissing plaintiff's appeal the Fifth Circuit did not specifically state defendants' post judgment

motion to tax cost was a rule 59(e) motion, however, it reached that result by referring to Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., (supra) and Willie V. Continental Oil Co., 784 F.2d 706 (5th Cir. 1986) a companion case, by stating as follows in the Buchanan slip opinion:

> "As we stated in Harcon:
>
> "Rule 4 was not intended to apply to motions to correct purely clerical errors, but it was intended to apply to all other timely motions to amend a judgment . . . A bright-line rule is essential to carry out the very purpose of the 1979 amendment to Rule 4(a)(4) and to avoid wasteful confusion over the status of a previously filed notice of appeal."
>
> The Harcon rule was applied to motions to Amend the Judgment regarding costs in both Harcon and the companion en banc case, Willie V. Continental Oil Co. 784 F.2d 706 (5th Cir. 1986)." Slip opinion, p. 2, 3.

It is important to note that Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., (supra), and Willie v. Continental Oil Co., (supra) involved Rule 52 post judgment motions by defendants to amend findings regarding payment of costs.

Buchanan differs and involves a post judgment motion by the prevailing party to tax allowable costs; therein lies the distinguishing factor.

The jurisprudence has uniformally classified motions for costs as Rule 60(a) motions using guidelines as stated in St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co., 684 F.2d 691 (10th Cir. 1982).

> "Motions to alter or amend the judgment are those which call into question the correctness of a judgment on some material point of fact or law, and may properly be cast in the form of a motion to reconsider, to vacate, to set aside, for reargument, or for rehearing. Motions seeking mere technical changes in the form of a judgment are not Rule 59(e) motions and do not toll the time for filing notice of appeal; rather, they are akin to Rule 60(a) motions to correct clerical errors in a judgment. (citations omitted)
>
> The mere fact that judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity in a judgment previously rendered, should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality. (citations omitted)" St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co., 684 F.2d 691, 693 (10th Cir. 1982).

The trial court's judgment in this case was silent on the matter of cost however, Rule 54(d) states "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." Since the court did not "otherwise direct", defendants' motion to tax allowable cost neither altered, modified or changed the substance of the judgment. Defendant's motion made no request to amend findings or make additional findings and reference to Rules 52 and 59 does not change the character of the motion. Under accepted criteria, defendants' motion was a Rule 60(a) motion and not a Rule 52 or 59 motion which nullified plaintiff's timely appeal.

No cases hold a rule to tax costs by a prevailing party as a Rule 52 or 59(e) motion to trigger Fed.R.App.P. 4(a)(4) and such contentions have been rejected whenever advanced.

In Lucas v. Florida Power & Light Co., 729 F.2d 1300 (11th Cir., 1984), defendant styled its motion for

costs as a Rule 59(e) motion contending it nullified the appeal citing Fed.R.App.P. 4(a)(4).

> "A motion respecting cost is not a motion to alter or amend a judgment under rule 59. Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute, and not matters collateral to the merits. A motion for cost does not seek reconsideration of substantive issues resolved in the judgment, but relates exclusively to the collateral question of what is due because of the judgment." (citations omitted)
>
> "Rule 54(d) and 58 are the applicable rules governing the allocation of costs. Rule 54(d) of the Federal Rules of Civil Procedure provides in part that 'costs shall be allowed as of course to the prevailing party unless the court otherwise directs.' It was therefore unnecessary for the court affirmatively to direct that the prevailing defendant be allowed costs."

In Miller v. Transamerican Press, Inc., 709 F.2d 524 (9th Cir. 1983) defendants contended its post judgment motion styled "a Rule 59 motion" for expenses nullified the appeal. The court held "nomenclature is not controlling" and defendant's post judgment motion for expenses invoked relief under Rule 60(a) not 59(e).

> "The history of Rule 59(e) shows that 'alter or amend' means a substantive change of mind by the court. (citations omitted)

In contrast a court's failure to memorialize part of its decision is a clerical error. Power to correct clerical errors or omissions derives from Rule 60. See Rule 60(a). Unlike Rule 59(e) motion, a Rule 60 motion does not affect the validity of a previously filed notice of appeal." (citations omitted); (emphasis ours)

Campbell v. Bowlin, 724 F.2d 484 (5th Cir., 1984), held "... defendant's post judgment motion for an award of attorney's fees was improperly characterized as a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment and that, therefore, the operation of Fed. R.App. P. 4(a)(e) was never triggered."

Durham v. Kelly, 810 F.2d 1500 (9th Cir., 1987) held defendant's post judgment motion for taxable costs styled as a motion under Rule 54(d) and 59(e) did not nullify the appeal.

"We adopt as law of this circuit the rule that a motion to alter or amend a judgment to award cost does not come within Rule 59(e). Accordingly, the provisions of rule 4(a)(4) which render ineffective a notice of appeal filed during the pendency of a motion to alter or amend a judgment are inapplicable with respect to a request for reconsideration concerning costs."

Alimenta (USA) Inc. v. Anheuser-Busch Companies, 803 F.2d 1160 (11th Cir., 1986), another cost motion submitted as a Rule 59(e) motion held:

"Rule 59 applies to motions for reconsideration of matters encompassed in a decision on the merits of the dispute and not matters collateral to the

merits ... In the present case, Anheusers' 'Rule 59' motion in fact request the court to tax the costs of the action to the losing party. In keeping with rule 4(a)(4) of the federal rules of appellate procedure, and with the Lucas case, Alimenta's first notice of appeal is valid." (emphasis ours)

On the issue of timeliness courts have routinely applied Rule 60(a) to motion for attorney fees, prejudgment interests or costs:

White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 102 S.Ct. 1162, 71 L.Ed. 2d 325 (1982) Holding Rule 59(e) does not apply to a post-judgment motion for attorney's fees citing Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir., 1980),

"A motion for attorney's fees is unlike a motion to alter or amend a judgment. It does not imply a change in the judgment, but merely seeks what is due because of the judgment. It is, therefore, not governed by the provisions of Rule 59(e)."

Lee v. Joseph E. Seagram & Sons, Inc., 592 F.2d 39 (2d Cir., 1979) treated a post judgment motion for the award of interest as a clerical error under Rule 60(a). Hayden v. Scott Aviation, Inc., 684 F.2d 270 (3d Cir. 1982) applied Rule 60(a) to motion for non discretionary prejudgment interest. Dura-Wood Treating Company v.

Century Forest Industries, 694 F.2d 112 (5th Cir., 1982), a motion to correct clerical error for adjustment of attorney's fees was a 60(a) motion.

In the Matter of Cobb, 750 F.2d 477 (5th Cir., 1985), the Fifth Circuit applied F.R.C.P. 60(a) to a motion to tax cost. Spray-Rite Service Corporation v. Monsanto Company, 684 F.2d 1226 (7th Cir., 1982) held the motion to assess costs and attorney fees was a Rule 60(a) motion to correct a clerk's omission. First National Bank in Greenwich v. National Airlines, 167 F. Supp. 167 (S.D.N.Y. 1958), applied the Rule 60(a) to the post judgment motion which amended the judgment by adding "with costs to the defendants".

CONCLUSION

The jurisprudence uniformally has classified post judgment motions for costs as Fed.R.Civ.P. 60(a) motions that have never triggered Fed.R.App.P. 4(a)(4).

The holding that a post judgment motion to tax allowable costs triggers F.R.A.P. 4(a)(4) is an extension of Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., (supra) and Willie v. Continental Oil Co. (supra), which

involved post judgment motions under Rule 52 to amend substantive terms of the judgment regarding costs.

This decision reclassifies motions heretofore considered Rule 60(a) motions and is in conflict with established jurisprudence, particularly the ninth and eleventh circuits that squarely reject the contention that a motion to tax cost triggers Fed.R.App.P. 4(a)(4).

The "bright line rule" creates confusion being inconsistent with uniform jurisprudence and it raises questions regarding timeliness of filing post judgment motions for attorney fees, interest and taxable costs heretofore considered Rule 60(a) motions that now might be Rule 59(e) motions for purposes of appeal and what motions will the Fifth Circuit consider to be a purely clerical error? Might it not be the clerk's failure to include in the judgment a provision for allowable costs pursuant Rule 54(d)?

Uncertainty will be reduced and uniformity will be increased by telling the Fifth Circuit motions for allowable costs by a prevailing party are Fed.R.Civ.P. 60(a) motions to correct clerical errors or oversight that

do not trigger the provisions of Fed.R.App.P. 4(a)(4). The writ should issue to review the decision.

Respectfully submitted,

Maughan, Atkinson & Martin, Ltd.
1755 Wooddale Blvd.
Baton Rouge, LA 70806
(504) 926-8533

By: _____
Roy Maughan

By: _____
Elliott W. Atkinson, Jr.

CERTIFICATE

I CERTIFY that a copy of the above and foregoing has this date been mailed to all counsel of record by placing same in the U. S. Mail, postage prepaid.

Baton Rouge, Louisiana this 2 day of June, 1987.

_____
Roy Maughan

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MERCILYN BUCHANAN, ET AL — CIVIL ACTION

VERSUS — NO. 82-128-B

STANSHIPS, INC.

JUDGMENT

For the written reasons assigned:

IT IS ORDERED AND ADJUDGED that judgment shall be entered in favor of defendant(s) and against the plaintiff(s) dismissing this suit with prejudice.

Baton Rouge, Louisiana, January 26, 1987.

s/Frank J. Polozola
UNITED STATES DISTRICT COURT

Notice Mailed
January 26, 1987

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MERCILYN BUCHANAN, ET AL — CIVIL ACTION

VERSUS — NO. 82-128-B

STANSHIPS, INC.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Mercilyn Buchanan, plaintiff above named, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered in this action on the 21st day of January, 1987.

By Attorneys,

Maughan, Atkinson & Martin Ltd.
1755 Wooddale Blvd.
Baton Rouge, LA 70806
(504) 926-8533

By:_____
Roy Maughan

Filed U.S. District Court,
Middle District of Louisiana
January 27, 1987
Lee Dupuis, Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MERCILYN BUCHANAN, ET AL — CIVIL ACTION

VERSUS — NO. 82-128

STANSHIPS, INC. — SECTION "B"

MOTION TO ALTER OR AMEND JUDGMENT

NOW INTO COURT, through undersigned counsel, come Stanships, Inc. and Trident Steamship Co., Ltd., and move this Honorable Court to amend its judgment signed on January 26, 1987, to reflect that defendants are entitled to recover their taxable costs against plaintiffs. This motion is asserted pursuant to the provisions of Rule 52 and Rule 59 of the Federal Rules of Civil Procedure. Grounds for this motion are more fully set forth in the supporting memorandum filed herewith.

Respectfully submitted,

_____
Robert P. McCleskey, Jr.
Trial Attorney

_____
Gerald T. Gelpi

Original Filed January 29, 1987
U.S. District Court
Middle District of Louisiana
Baton Rouge, La.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MERCILYN BUCHANAN, ET AL	CIVIL ACTION
VERSUS	NO. 82-128
STANSHIPS, INC.	SECTION "B"

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that defendants' Motion to Alter and Amend Judgment be and is hereby granted, to reflect that defendants are entitled to an award against plaintiffs in the amount of their legally taxable costs.

Baton Rouge, Louisiana this 30th day of January, 1987.

s/Frank J. Polozola
UNITED STATES DISTRICT JUDGE

Notice Mailed
January 30, 1987

MOTION TO DISMISS APPEAL
AND INCORPORATED SUPPORTING MEMORANDUM

NOW INTO COURT, through undersigned counsel, come Stanships, Inc. and Trident Steamship Co., Ltd., defendants/appellees herein, and move this Honorable Court to dismiss the appeal of Mercilyn Buchanan, in her individual capacity and as guardian of Andreas Mark Anthony Shaw, on the following grounds:

I.

On February 24, 1986, trial of this matter was held in the United States District Court, Middle District of Louisiana, before the Honorable Frank J. Polozola. The trial lasted approximately one day, and thereafter, was taken under submission by the Court.

II.

On January 8, 1987, a minute entry, indicating plaintiffs' suit against defendants would be dismissed, was issued by Judge Polozola. Further, the minute entry stated that written reasons for the Court's ruling would be assigned, and that final judgment would be entered after filing of the written decision. (Exhibit A)

III.

On January 20, 1987, Judge Polozola rendered his written decision, setting forth the factual and legal findings supporting dismissal of plaintiffs' suit. (Exhibit B)

IV.

On January 26, 1987, Judgment was entered against plaintiffs and in favor of defendants, dismissing plaintiff's suit with prejudice. (Exhibit C)

V.

The very next day, January 27, 1987, plaintiffs filed Notice of Appeal to this Honorable Court. (Exhibit D)

VI.

On January 29, 1987, Stanships, Inc. and Trident Steamship Co., Ltd. timely filed and served their Motion to Alter or Amend Judgment under Rule 52 and Rule 59 of the Federal Rules of Civil Procedure. Specifically, the motion requested that Judge Polozola award defendants recovery of their legally taxable costs against plaintiffs. (Exhibit E)

VII.

On January 30, 1987, Judge Polozola granted defendants' Motion to Alter or Amend Judgment and entered an Order stating defendants were entitled to an award against plaintiffs in the amount of their legally taxable costs. Thereafter, defendants submitted their Bill of Costs which was approved and taxed by the Clerk of Court on February 9, 1987. (Exhibit F)

VIII.

Rule 4(a)(1) of the Rules of Appellate Procedure states that a notice of appeal shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from. However, Rule 4(a)(4)(ii) and (iii) of the Rules of Appellate Procedure specifically modify the aforementioned time period for filing of a valid notice of appeal.

IX.

Rule 4(a)(4) provides that if a timely motion under either Rule 52(b) or Rule 59 of the Federal Rules of Civil Procedure is filed, as was the case herein, then the time for appeal shall run from the entry of the order denying

or granting such motion. Accordingly, in the instant matter the time for filing of a valid notice of appeal by plaintiffs began January 30, 1987, the date Judge Polozola entered his order granting defendants' Motion to Alter or Amend Judgment pursuant to Rule 52 and Rule 59 of the Federal Rules of Civil Procedure.

X.

More importantly, Rule 4(a)(4) provides specifically as follows:

> A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing. (emphasis added)

XI.

Accordingly, plaintiffs' original notice of appeal filed on January 27, 1987, is of no effect. They have not timely filed a new and valid notice of appeal after entry of the order granting defendants' Motion to Alter or Amend Judgment on January 30, 1987, as mandated by Rule 4(a)(4) of the Rules of Appellate Procedure. The

delays for filing of a timely and valid notice of appeal have long passed.

XII.

A situation very clearly akin to that involved herein was examined by this Honorable Court in Harcon Barge Co., Inc. v. D&G Boat Rentals, Inc., et al, 746 F.2d 278 (5th Cir. 1984), cert. denied, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). As discussed in Harcon, the requisite for filing of a timely and valid notice of appeal is both mandatory and jurisdictional.

XIII.

Pursuant to the provisions of Rule 4(a)(4) of the Rules of Appellate Procedure, as well as under the holding and guidance of the Harcon decision, plaintiffs' original notice of appeal filed on January 27, 1987, is of absolutely no effect. Accordingly, movers respectfully submit that as the delays for filing of a timely and valid notice of appeal have passed, plaintiffs' present appeal predicated on their original and invalid notice should be dismissed.

WHEREFORE, movers, Stanships, Inc. and Trident Steamship Co., Ltd., pray that the appeal filed by Mercilyn Buchanan, in her individual capacity and as guardian of Andreas Mark Anthony Shaw, should be dismissed by this Honorable Court.

Respectfully submitted,

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430 Notre Dame Street
New Orleans, Louisiana 70130
Telephone: (504) 524-9714
Attorneys for Defendants/Appellees,
Stanships, Inc. and Trident
Steamship Co., Ltd.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 87-3062

USDC #CA 82-128 B

MERCILYN BUCHANAN, Individually
and as Guardian of the Minor
ADREAS MARK ANTHONY SHAW
Plaintiffs-Appellant

versus

TRIDENT SHIPPING CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Louisiana

Before CLARK, Chief Judge, GARWOOD and HILL, Circuit Judges.

BY THE COURT:

The defendants-appellees in this case, Stanships, Inc. and Trident Steamship Co. Ltd., move to dismiss the appeal as untimely. The plaintiffs, Mercilyn Buchanan, et al., filed a timely notice of appeal the day after judgment was entered. Two days later the defendant timely filed a

Motion to Alter or Amend the Judgment to reflect that the defendants were entitled to recover their costs. The district court granted the motion. The plaintiffs did not file any subsequent notice of appeal.

The defendants assert that the appeal must be dismissed because under Rule 4(a)(4) of the Federal Rules of Appellate Procedure a notice of appeal that is filed before final disposition of a motion to Alter or Amend the Judgment is a nullity. A new notice of appeal must be filed following final disposition of the motion.

The plaintiffs assert that the motion in this case should not trigger Rule 4(a)(4) because it was not a legitimate topic for a Rule 59 motion to Alter or Amend the Judgment. They assert that only motions affecting the merits of the judgment, rather than collateral issues such as costs or attorney fees, are proper topics for Rule 59.

Both sides have overlooked the fact that this circuit, in its en banc decision in Harcon Barge Co., Inc. v. D&G Boat Rentals, Inc., 784 F.2d 665 (5th Cir. 1986), established a bright line rule for the application of rule

4(a)(4). As we stated in Harcon:

> Rule 4 was not intended to apply to motions to correct purely clerical errors, but it was intended to apply to all other timely motions to amend a judgment ... A bright-line rule is essential to carry out the very purpose of the 1979 amendment to Rule 4(a)(4) and to avoid wasteful confusion over the status of a previously filed notice of appeal.

The Harcon rule was applied to motions to Amend the Judgment regarding costs in both Harcon and the companion en banc case, Willie v. Continental Oil Co., 784 F.2d 706 (5th Cir. 1986). Accordingly, the motion of appellees to dismiss the appeal is

GRANTED.

U.S Court of Appeals
Filed April 6, 1987.
Gilbert F. Ganucheau, Clerk

IN THE UNITED STATES OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 87-3062

MERCILYN BUCHANAN, Individually
and as Guardian of the Minor
ANDREAS MARK ANTHONY SHAW,
Plaintiff-Appellant,

versus

TRIDENT SHIPPING CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Louisiana

Before: CLARK, GARWOOD and HILL, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion for rehearing, being treated as a motion for reconsideration of the Court's order of April 6, 1987, granting appellees' motion to dismiss is DENIED.

U.S. Court of Appeals

Filed May 11, 1987

Gilbert F. Ganucheau, Clerk